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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-427

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SUN SHIPBUILDING & DRY DOCK COMPANY, *Petitioner*,

v.

UNITED STATES OF AMERICA and PRUDENTIAL-GRACE LINES, INC., *Respondents*.

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**On Petition for a Writ of Certiorari to The United States Court of Claims**

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## BRIEF FOR RESPONDENT PRUDENTIAL-GRACE LINES, INC. IN OPPOSITION

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MICHAEL JOSEPH
500 Tower Building
Washington, D. C. 20005
*Counsel for Respondent Prudential-Grace Lines, Inc.*

*Of Counsel:*

MARCUS B. SLATER, JR.
KOMINERS, FORT, SCHLEFER & BOYER

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### OPINION BELOW

The opinion of the Court of Claims (Pet. App.) is reported at 461 F.2d 1352.

### JURISDICTION

The jurisdictional facts are adequately set forth in the petition.

## QUESTION PRESENTED

Whether the Court of Claims erred in concluding, from the particular facts presented, that the Government had not breached its obligation to render a timely disputes-clause decision under a Government contract.

## STATEMENT

The present case arises under a ship construction contract among Sun Shipbuilding & Dry Dock Co. ("Sun"), Prudential-Grace Lines, Inc. ("Grace") and the United States, acting through the Secretary of Commerce represented by the Maritime Subsidy Board ("Board"), whereunder Sun agreed to build six cargo ships for Grace for approximately $78 million, of which approximately 46.5% was to be paid by Grace and 53.5% by the Board.[1] The contract contains a disputes clause, providing that all disputes arising under the contract shall be decided by the Maritime Administration's Chief, Office of Ship Construction (the "COSC"), whose decision shall be final unless timely appealed to the Board, and that the Board's final decision upon questions of fact shall have the usual, so-called "Wunderlich Act" finality.[2] Three disputes between Sun and Grace under the contract have been the subject of final Board decisions upon

[1] The Board's share was in the form of construction-differential subsidy authorized by Title V of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1171, *et seq.*, which is a shipyard subsidy designed to equalize the cost of building ships in U.S. yards with the lower cost of building them abroad. See Lykes-Youngstown Corp. v. United States, 420 F.2d 735, 737, 190 Ct. Cl. 348, 352, *cert. denied*, 400 U.S. 865 (1970).

[2] The disputes clause, which differs from the conventional standard form, is set forth in full in the Appendix to the decision of the court below, 461 F.2d at 1363-1364, Pet. A21-A22.

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appeal from decisions of the COSC. The present case involves Sun's attempt to by-pass a final decision upon a fourth dispute by suing upon it in the Court of Claims, alleging that the administrative process need not be completed because it has been taking too long.

This dispute has two separate, but interrelated, aspects—a request for time extension and an application for extra costs. The time-extension aspect involves Sun's application for extension of contract delivery dates to relieve Sun of paying liquidated damages to Grace and the Board for delay in delivery which Sun contends was caused principally by Grace's changes in the contract work. The cost aspect involves Sun's application for an increase in the contract price for the same changes, of which the major portion is not for the direct costs of actually performing the changes, but rather for alleged costs to Sun of the same delay that Sun contends was caused by Grace's changes.[3]

On October 6, 1971, when Sun commenced its action seeking to have this dispute tried by the Court of Claims, the status of the disputes-clause proceedings was as follows: The time-extension aspect had been the subject of a final decision by the COSC, had been appealed by both Sun and Grace to the Board, had been referred by the Board to a hearing examiner to take evidence and issue a recommended decision, had

[3] The contract does not contain the "equitable adjustment" clause found in many Government contracts. Price increases for changes are effected under a "changes" article, quoted in full in the appendix to the opinion below (461 F.2d at 1361-1363; Pet. A18-A21), which requires the contractor to submit "detailed estimate[s] of the net increase . . . in the cost of the contract work" resulting from changes and provides for contract price increases of 110% of the net increase in estimated cost resulting from all such estimates "as approved or as finally determined" by the Board.

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been the subject of prehearing conferences, extensive discovery and preparation for hearing, and was the subject of an order directing the hearing to commence on December 6, 1971.

The related cost aspect was at this time still before the COSC. The $18 million cost estimate which Sun had put before him for decision, however, had not been submitted until July 1970, when Sun revised a prior estimate in order to utilize new methods of shipyard cost computations recommended by a Board hearing examiner in a similar dispute between Sun and another shipowner, U.S. Lines.[4] Following Grace's December 1970 response, the COSC did not immediately react to the estimate and decided instead to await the final decision of the Board itself in the same Sun/U.S. Lines case on which Sun was now relying. That final decision was handed down in August 1971, whereupon the COSC proceeded with evaluation of Sun's cost estimate. The COSC rendered his final decision on the cost aspect three months after commencement of the action below, and it, too, is now on appeal to the Board, having been consolidated with the time-extension aspect.[5]

In response to motions and supporting affidavits of the Government and Grace (which had been notified to appear as a third party under 41 U.S.C. § 114(b)), a unanimous Court of Claims, per Judge Davis, found

[4] Sun had submitted an earlier detailed estimate of $13 million for these changes in December 1967 and still an earlier $3 million estimate in March 1965.

[5] Interestingly, the hearing on appeal has not yet begun because Sun, over Grace's objection, has successfully requested postponements, for nearly a year to date, while it continues to press its court complaint that the administrative process is taking too long.

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that on these facts there had been no breach of the Government's obligation to render timely decisions. The court's analysis of Sun's claim of undue delay proceeded from its view that "[t]here is, of course, no rule of thumb for appraising delays in the contractual-administrative process" and "[t]he overall standard for evaluating the propriety of a delay looks to the particular case and the particular situation . . ." (461 F.2d at 1358; Pet. A10). The court noted that Sun's only challenge to the handling of the time-extension aspect of the dispute was that the hearing examiner, following the Board's referral of the matter to him on February 25, 1971, had on two occasions postponed an August 3 hearing date, first to early October and then to December 6, 1971. The court found that the postponements were granted to permit Grace to complete discovery of the shipyard's voluminous records, that Sun had not permitted Grace access to these records until late February 1971, that Sun's own failure to grant such access earlier (Grace had first requested access three years earlier) indicated that the challenged delay had not been entirely beyond Sun's control, and that upon these facts it was "unable to conclude that the postponements . . . were so unwarranted as to amount to a breach of the Government's duty to decide" (461 F.2d at 1360; Pet. A15).

As to the cost aspect, the court found that Sun, by submitting a new cost estimate in July 1970 based upon tentative developments in the Sun/U.S. Lines dispute, had itself in large measure occasioned the postponement of the COSC's evaluation of the estimate. Moreover, the court found that it would in any event have been reasonable, if not inevitable, for the COSC to await final developments in the Sun/U.S. Lines dispute, in view of its striking similarities with the pres-

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ent dispute and the significant issues that were there being presented to the Board for the first time (461 F.2d at 1359; Pet. A12-A13). In this connection, the court pointed out that "[t]ribunals often defer action until another controversy raising the same questions has been resolved, either by the tribunal itself or by another."

Thus unable to conclude that Sun had been deprived of its contractual-administrative remedy, the court dismissed Sun's action, without prejudice to its renewal upon completion of disputes-clause proceedings (461 F.2d at 1361; Pet. A18).

## ARGUMENT

The decision of the court below applies established principles of law to the particular facts presented, conflicts with no other decision and is correct. No occasion is presented for review by this Court.

1. The opinion below assumes applicability of, and reaffirms, the well-settled principles that contractors need not pursue contract-administrative remedies where such remedies are inadequate or unavailable, and that a breach of the Government's obligation to render a timely decision may be tantamount to inadequacy or unavailability. See, *e.g.*, *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429, 430; *Zidell Explorations, Inc.* v. *United States*, 427 F.2d 735, 739, 192 Ct. Cl. 331, 338 (1971).[6] The issue decided by the court was simply whether, on the particular facts of this case, it could be concluded that the

[6] Most of petitioner's argument (Pet. 6-9) consists of nothing more than an elaboration of policy reasons underlying these accepted principles.

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Board had here breached the obligation to render a timely decision. Accordingly, the decision has little, if any, significance beyond the present case, and presents the classic situation for application of the principle that this Court does "not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227; see also *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178.[7]

2. The decision below is neither in conflict nor inconsistent with other decisions, and is clearly correct. Petitioner's claim that this case involves a contractor who has waited 45 months for a disputes-clause decision is, and has been, merely petitioner's allegation. The facts are otherwise, as the Court of Claims found. A crucial fact ignored by Sun's allegation is that the cost estimate that Sun wants approved has not been pending 45 months, but was submitted in July 1970, only 15 months before commencement of the action

[7] As to the decision's applicability to other situations, it is emphasized that the facts of this case involve the operation of a "special disputes mechanism" (461 F.2d at 1356; Pet. A6) implementing a change-cost-estimate procedure (note 3, *supra*) which, so far as Grace is aware, is unique to the Maritime Subsidy Board's ship construction contracts. Moreover, following certain amendments to the Merchant Marine Act in 1970 (84 Stat. 1018, 1021), these special procedures are becoming obsolete even within that agency. The legislative history of those amendments thus states, in connection with the changes to the provision authorizing the present contract:

> Three new two-party contracts are envisioned under this section. . . . The use of separate contracts is intended to keep the government out of the relationship between the operator and the shipyard *and out of the disputes* that may arise between them with respect to construction of the ship. [Emphasis supplied.]

H. R. Rep. No. 91-1073, 91st Cong., 2d Sess. 34 (1970).

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below. While Sun submitted another estimate at the end of 1967, its attempt to sue upon the 1970 estimate for purposes of the merits, but to rely upon an earlier, substantially lower one for purposes of its undue delay argument, was properly rejected by the lower court. Sun's allegation also ignores the reason for the COSC's deferral of evaluation of the estimate during the eight months following Grace's response.[8] As the court found, a deferral to await the final outcome of the parallel Sun/U.S. Lines case would have been proper in any event in view of the significance of that case to the present one (see 461 F.2d at 1359; Pet. A11-A12). Coupled with the additional fact that Sun's own revised estimate was based upon tentative developments in the very same case, the court's conclusion as to the propriety of the deferral becomes inescapable.[9] Finally, Sun ignores the fact that the time-extension aspect of the dispute, which is very much a part of—indeed, necessary to a final decision in—the cost aspect, was just weeks away from the hearing on appeal when Sun filed suit. In view of Sun's refusal to grant discovery for three years, the court's rejection of Sun's argument that the hearing examiner allowed too much time for its adversaries to prepare for that hearing is also hardly open to question.

Viewed, as it must be, in the context of the facts rather than the allegation, the decision below is in no

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[8] While Sun now argues that the lower court erred in failing to give it an evidentiary hearing as to the reason for deferral, at no time did Sun request the court to hold such a hearing.

[9] The revised estimate was not a mere correction of mathematical errors. Various alleged cost items were increased, reduced or withdrawn and radical changes in calculation methods were employed. The aggregate estimate of delay costs was increased by nearly 50%.

manner inconsistent with the cases cited at page 5 of the petition, each of which involved wholly different factual circumstances.[10]

## CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL JOSEPH
500 Tower Building
Washington, D. C. 20005
*Counsel for Respondent*
*Prudential-Grace Lines, Inc.*

*Of Counsel:*
MARCUS B. SLATER, JR.
KOMINERS, FORT, SCHLEFER & BOYER

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[10] The court below relied upon one of the very cases cited by petitioner, Universal Ecsco Corp. v. United States, 385 F.2d 421, 425, 181 Ct. Cl. 10, 18 (1967), for the proposition that each case of alleged administrative delay must be evaluated in the light of its particular facts (461 F.2d at 1358; Pet. A10).